***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7105

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OSCAR ROBERTSON, et al.,

Plaintiffs,

-against-

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

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AMERICAN BASKETBALL ASSOCIATION, et al.,

Cross-Claimants,

-against-

NATIONAL BASKETBALL ASSOCIATION, et al.,

Cross-Defendants-Appellees.

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R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc. d/b/a Utah Stars,

Cross-Claimant-Appellant,

-against-

FREDERICK P. FURTH,

Appellee,

AMERICAN BASKETBALL ASSOCIATION, LONG ISLAND SPORTS, DENVER NUGGETS, INC., SPURS PROFESSIONAL BASKETBALL CLUB, LTD. and INDIANA PACERS, L.P.,

Intervenor-Appellees.

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On Appeal From An Order Of The United States District Court For The Southern District Of New York

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# BRIEF FOR CROSS-DEFENDANTS-APPELLEES

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Lest their silence be misconstrued, cross-defendants-appellees National Basketball Association ("NBA")

and its member teams (collectively "NBA cross-defendants") submit this brief solely to deal with the unfounded and rather scurrilous suggestion, made in the brief of appellant Utah*, that the NBA cross-defendants somehow conspired with the intervenor-appellees ("intervenors") "to impress a covenant upon Furth barring his continued representation of . . . Utah". (Utah Br. 18) There is no proof in the record of such a conspiracy -- indeed Utah submitted no affidavits at all in connection with the order appealed from -- and the fact is that there was no such conspiracy.**

Since its organization in 1946 the NBA has been a joint venture organized under New York law. Accordingly, as a matter of law, all members of the NBA are liable for its debts*** and the NBA joint venture agreement (A 141) so provides.

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* "Utah" refers to cross-claimant-appellant R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc. d/b/a Utah Stars.

** Nor did Utah submit an affidavit or offer proof of any kind of such a conspiracy to the United States District Court for the Northern District of California (Zirpoli, J.), where three months earlier an identical motion was argued and decided precisely as did the court below, namely, allowing appellee Furth to withdraw as counsel. (A 11-13, 112-115) ["A" refers to Appendix for Cross-Claimant-Appellant.]

*** See, e.g., N.Y. Partnership Law §§26, 28 (McKinney 1948); Pedersen v. Manitowoc Co., 25 N.Y.2d 412 (1969); Caplan v. Caplan, 268 N.Y. 445 (1935); Wisnouse v. Telsey, 367 F. Supp. 855 (S.D.N.Y. 1973)(Weinfeld, J.), applying New York law.

The joint venture agreement, which was in effect long before this lawsuit began, was signed by intervenors Denver, Indiana, New York and San Antonio when they became NBA members, just as it had been signed by all entities that had previously become members of the NBA. By becoming members of the NBA the four new teams became liable for the NBA's debts, including any debt arising from a judgment that Utah might obtain in this litigation. The intervenors' signing of the NBA joint venture agreement had absolutely nothing to do with entering "into a covenant with the NBA restricting Furth from continued representation of the Utah Stars" (Utah Br. 6); it was simply necessary if they were to become NBA members which, as Utah itself concedes, was the "desired result" when the litigation began. (Utah Br. 8)

When the expansion teams became NBA members, they also agreed to indemnify the NBA cross-defendants from a variety of different claims, including the instant suit. (A 8, 117) When faced with a complaint about the indemnity agreement, Judge Carter, who was intimately involved with every step of this litigation in the more than two years that it has been pending before him, and at whose suggestion settlement talks first began*, stated that the indemnity

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* See transcript of hearing before Judge Carter on April 9, 1976 at pp. 20-25 (Document No. 585 in Record on Appeal).

provisions are "a perfectly natural kind of situation." (A 77) The indemnity agreement was entered into for legitimate and normal business reasons and had nothing whatsoever to do with creating a conflict that would prevent Furth from representing Utah.*

In short there is no record support -- nor could there be -- for Utah's suggestion that the NBA cross-defendants' settlement with the intervenors "effectuates an improper restrictive covenant between the settling ABA teams and the NBA barring Furth's representation". (Utah Br. 3)

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Cross-Defendants-Appellees other than Madison Square Garden Center, Inc. and Madison Square Garden Corporation

Of Counsel:

Michael A. Cardozo
Richard L. Wasserman

April 7, 1977

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* If Utah really believes that there was a conspiracy and is prepared to come forward with evidence of it, its remedy is to sue the alleged conspirators, as Judge Zirpoli in the California action suggested (A 126, 130, 131), as cross-claimant Virginia has done, albeit in the wrong forum (A 19-59), and as Utah itself has recognized (Utah Br. 16). Utah's remedy, however, is not to inject such claims into this appeal by mere innuendo, without support in the record and without foundation in fact or law.